United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 142-146

UNITED STATES, Petitioner,

vs.

HOWARD C. MYERS

—

UNITED STATES, Petitioner,

vs.

JOHN H. ARBLE

—

UNITED STATES, Petitioner,

vs.

CHARLES C. MARTIN

—

UNITED STATES, Petitioner,

vs.

WALTER O. PLITZ

—

UNITED STATES, Petitioner,

vs.

GEORGE H. SPITZ

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

RESPONDENTS' SUPPLEMENTAL MEMORANDUM

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Further answering the questions of the Honorable the Chief Justice and Associate Justices propounded at the argument, we summarize as follows.

Although the Secretary of the Treasury never selected the word "overtime" and gave to that word a separate definition, yet he did define with particularity the services to be compensated by the overtime pay. If those regulations had been obeyed respondents would have received payment in full for the services here involved.

The regulations, as existing since 1922, defining those services, appear in 1937 regulations and are hereinafter set forth in full, and are paraphrased as follows:

Overtime Service

"Art. 1242. Extra compensation.—(a) Customs officers and employees performing services at night, or on Sundays and holidays, for lading or unlading of cargo or merchandise, * * * *shall receive extra compensation, to be paid by* the master, owner, or agent of the vessel, or by *the transportation company.*" (Italics ours.)

NOTE. The foregoing is the enacting clause of the Regulations and creates the grant of additional pay and the word "overtime" is not used therein.

"(e) The extra compensation for *overtime services* is in addition to the regular compensation paid by the Government * * *." (Italics ours.)

NOTE. We suggest that the word "overtime" as used in section (e) was intended to and does mean the services described in section (a), and includes both night services and also Sunday and holiday services, as both, are in addi-

tion to the regular pay therein mentioned. Also, that as so used, they set forth the Secretary's definition of "overtime." Otherwise that word would have been further defined.

Art. 1243. *Definition of "night" and "holiday."*

Here follows the statutory definition of "night." The days designated as holidays are enumerated.

> "Art. 1244. *Rate of Compensation.*—(a) For service performed after 5 P. M. of any days, including Sundays and holidays, one-half day's pay will be allowed for each 2 hours or fraction thereof of at least 1 hour that the overtime extends beyond 5 P. M., provided that the overtime is not less than one hour. * * *"

NOTE. Respondents suggest that services between 5 P. P. and 8 A. M. are here described as "overtime services."

> "Art. 1245. *Sundays and holidays.*—(a) For authorized services performed on Sundays and holidays between 8 A. M. and 5 P. M., customs officers and employees shall be entitled to 2 days' pay in addition to their regular compensation."

NOTE. The word "overtime" is not used in connection with the Sunday and holiday pay prescribed in the foregoing section (a), although 2 days extra pay for services on those days is allowed.

For convenience we quote the definition of "overtime" as given by this Court in the case of *International Railway v. Davidson*, 257 U. S. 506, 510, 511:

> "The Fifth Section gives the Secretary of the Treasury power to fix extra compensation to be paid customs officials serving at night, on Sundays or on holidays in connection with lading or unlad-

> ing * * *. *This substituted section defines what shall be deemed overtime*, how the rate of extra pay shall be fixed, and what the work is, for which extra compensation shall be paid." (Italics ours.)

This definition was cited by the District Court for the Eastern District of Michigan, in *Ferguson v. Port Huron & Sarnia Ferry Co.*, 13 Fed. 2d 489, 492, from which we quote:

> "As was pointed out by the Supreme Court in its opinion in *International Railway Co. v. Davidson*, 257 U. S. 506, 42 S. Ct. 179, 66 L. Ed. 341: 'This * * * section defines what shall be deemed overtime.' The only definition thus employed was the reference to the period of time between the particular hours specified, without regard to the question whether the services rendered 'at night' or 'on Sundays or holidays' immediately and continuously followed services just completed for regular pay. Clearly, the object of the statute was to facilitate lading and unlading 'at night' and on Sundays and holidays, irrespective of whether the officers working in connection therewith had previously worked during the regular hours of the immediately preceding regular working 'day.'"

The meaning of the words "remain on duty" is shown in respondents' brief at pages 60 and 31. By giving effect to petitioner's construction that those words denote an inspector must remain on duty after 5 o'clock, would accomplish an unreasonable result, in this, that one assigned to duty during the night, as for example, between 10 P. M. and 12 P. M., would not then be entitled to overtime because of not having remained on duty after 5 P. M.

Answering the questions as to the conditions under which extra compensation was paid for Sunday and holiday services, the practice, as it existed, is accurately described in Findings Nos. 5 and 6, R. 41, 42, which shows that prior

to November 15, 1929, additional compensation was paid for Sunday and holiday services at all facilities then open, except for a limited period at the Michigan Central Freight Station, and thereafter that such additional compensation was paid only at the car ferries. When such payment was made, two conditions united, namely, the work always was performed on a Sunday or a holiday, and also the work was in excess of 48 hours per week.

No regulation was ever promulgated by the Secretary conditioning that payment on hours in excess of any number of stated hours per week. Payment for any such consideration would have been illegal, as the statute then permitted payment only for days actually worked in aid of the customs. Probably the true reason why such payments were made, was stated by the Mr. Bond, cited by petitioner, in a brief filed by him with Senate Committee on Commerce, 67th Congress, in which he stated:

> "The Treasury Department has ruled that where railroad, ferry, or bridge traffic is continuous throughout the 24 hours, those are the 'customary working hours,' and has placed inspectors on duty in 8-hour shifts, and no charge is made against transportation companies for overtime compensation on week days; *the only charge being for Sundays and holidays, days which are universally recognized in all industries to be overtime.* * * *" (Italics ours.) (Petitioner's Brief, pp. 118, 119.)

HISTORY OF GRANT OF ADDITIONAL PAY

Act of March 2, 1799, granted to customs inspectors their hours on Sunday, the Fourth of July and those between sunset and sunrise, resulting in leaving with them the right to bargain with the vessel owner for a rate to be paid for those hours, whenever a special license to unlade was issued.

Act of March 3, 1873, provided for the fixing of a reasonable and uniform rate for the night hours included in the grant of additional pay, and required Government to assume the obligation of collecting the same and paying the inspectors. It bettered the status of customs employees.

By Act of June 26, 1884, the grant of additional pay was extended to services in connection with unlading sailing vessels.

By Act of February 13, 1911, the grant was extended to include additional services and employees. A question might arise whether by reason of the language used in this act, this grant was broad enough to include Sunday and holiday services. However, the Secretary construed the grant to include services on those days.

By Act of February 7, 1920, the grant was again broadened to include additional employees and services and the wording was altered to include specifically, Sunday and holiday work. In this enactment, the word "overtime" was first used in connection with this grant. Prior to that time, every succeeding enactment had bettered the status of customs employees. The purpose of this enactment was to do likwise. For 121 years the intention of Congress with respect to the consideration for the additional pay had been expressed in terms of services performed at night and on Sundays and holidays. Under those conditions, to place a construction on the words "overtime services" so as to impair that grant is unreasonable and conflicts with the history and purpose of the grant.

The Tariff Act of 1922 extended the grant to include all of the facilities and services here involved.

Respectfully submitted,

ROBERT M. DRYSDALE,
Attorney for Respondents.

December 22, 1943.

APPENDIX

OVERTIME SERVICE

(Italics ours)

Art. 1242. Extra compensation.—*(a)* Customs officers and employees performing services at night, or on Sundays and holidays, for lading or unlading of cargo or merchandise, or lading cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo or merchandise on or from the wharf, or in connection with the unlading, receiving or examination of passengers' baggage, or in boarding vessels, or in the entrance and clearance of vessels, or in the issuance and recording of their marine documents and instruments of title, shall receive extra compensation, to be paid by the master, owner, or agent of the vessel, or by the transportation company.

(*b*) Boarding officers shall receive extra compensation for night services and Sunday and holiday service at the same rates as other customs officers, the amount of such extra compensation to be prorated among the various vessels boarded.

(*c*) The rates of extra compensation are payable in cases where the services of customs officers or employees have been duly requested and the officers or employees have reported for duty, even though no actual service may be performed.

(*d*) Customs officers and employees should be ordered to report for duty sufficiently in advance of the expected arrival of a train or vessel to properly safeguard the reve-

nue. However, waiting time should be reasonable and compatible with the circumstances in each case.

(*e*) The extra compensation for *overtime* services is in addition to the regular compensation paid by the Government in the case of officers and employees whose compensation is fixed on the ordinary per diem basis and those receiving a compensation per month or per annum.

(*f*) Extra compensation for "waiting time" will not be allowed unless and until an officer or employee actually reports for duty.

Art. 1243. Definition of "night" and "holiday."—For the purpose of computing extra compensation the word "night" will be construed to mean the time from 5 p. m. to 8 a. m. and the term "holiday" shall include only national holidays, viz, January 1, February 22, May 30, July 4, the first Monday in September, Thanskgiving Day (when designated by the President), and December 25, and such other days as may be made national holidays.

Art. 1244. Rate of compensation.—(*a*) For service performed after 5 p. m. of any days, including Sundays and holidays, one-half day's pay will be allowed for each 2 hours or fraction thereof of at least 1 hour that the *overtime* extends beyond 5 p. m., provided that the *overtime* is not less than 1 hour. The maximum amount which may be paid an employee for services between 5 p. m. and 8 a. m. shall not exceed 2½ days' pay.

(*b*) In computing the amount earned for *overtime* at the rate of "one-half day's pay for each 2 hours or fraction thereof of at least 1 hour that the *overtime* extends beyond 5 p. m.," one-half day's pay shall be one-half of the gross daily rate of pay; each 2 hours is the time period for pur-

pose of computation; at least 1 hour means the minimum service in each period for which extra pay may be granted. If service continues beyond a 2-hour period, it must extend for at least 1 hour into the following 2-hour period to be entitled to extra pay for the second period. When the *overtime* extends beyond 5 p. m. payment of extra compensation from 5 p. m. for services consisting of at least 1 hour is authorized, even though such services may not actually begin until 7 p. m., 9 p. m., or later: *Provided, however,* That the officer rendering the service remained on duty from 5 p. m., in which case the time between 5 p. m., and the time of beginning the actual service shall be computed as waiting time, and where the actual services begin as late as 9 p. m. there should be an affirmative statement that the officer was required to remain on duty between 5 p. m. and 9 p. m., if a charge for waiting time is made. Where, however, service is rendered between 6 a. m. and 8 a. m. only, the charge for such services, or 1 hour thereof, will be one-half day's extra pay.

(*c*) In computing extra compensation where the services rendered are in broken periods and less than 2 hours intervene between such broken periods, the time served should be combined with the waiting time and computed as continuous service.

(*d*) Where 2 hours or more intervene between broken periods, one-half days' extra pay will be allowed for each distinct 2-hour period or part of a 2-hour period, if waiting time and actual service rendered within each period consist of at least 1 hour.

(*e*) The same construction should be given the act when charging for waiting time as governs the charge for services actually rendered. No charge should be made unless after having reported for duty the waiting time amounts to at least 1 hour.

Art. 1245. Sundays and holidays.—*(a)* For authorized services performed on Sundays and holidays between 8 a. m. and 5 p. m., customs officers and employees shall be entitled to 2 days' pay in addition to their regular compensation.

(b) Officers and employees who are paid on a per diem basis "when employed" will receive no other compensation for services rendered by them on Sundays and holidays than that allowed under the *overtime* act.

(c) If *overtime* service is performed on Sundays or holidays in connection with the unlading or other authorized service for two or more vessels or vehicles the 2 days' extra compensation shall be prorated between the different vessels or vehicles.